SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1971

No. 71-473

MARTIN S. WEG, DDS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. _____

MARTIN S. WEG, DDS,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Martin S. Weg, DDS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 2, 1971.

OPINION BELOW

The appeal was expedited to judgment within thirty (30) days after filing of notice of appeal pursuant to 28 U.S.C. §1826(b).

A written opinion was issued on September 2, 1971. A copy thereof is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Court of Appeals was entered on September 2, 1971. No petition for rehearing was filed. This petition for certiorari is filed within thirty (30) days of the date of entry of the judgment of the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether under a grant of use-immunity conferred under a federal use-immunity statute, a witness can be compelled to testify before a federal grand jury over his claim of the Fifth Amendment privilege against self-incrimination when the immunity so conferred leaves the witness subject to prosecution for the transaction concerning which he has been required to testify.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . . ."

Sections 202-203, Organized Crime Control Act of 1970; United States Code, Title 18:

> "§6002. Immunity Generally.
>
> "Whenever a witness refused, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to --
>
> "(1) a court or grand jury of the United States,
>
> "(2) an agency of the United States, or
>
> "(3) either House of Congress, a joint committee of the two Houses, or a committee or a sub-committee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

"§6003. Court and grand jury proceedings

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against

self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment --

"(1) the testimony or other information from such individual may be necessary to the public interest; and

"(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

STATEMENT OF THE CASE

Petitioner was summoned to appear and testify before a federal grand jury in Los Angeles, California on April 29, 1971, and to produce all dental records covering the seventeen-year span of his association with Dr. Bernard Bender. At that time, petitioner refused to testify or provide other information on the basis of the privilege against self-incrimination.

Petitioner was ordered to reappear before the grand jury on June 10, 1971. On June 8, 1971, a motion to quash the subpoena duces tecum was made.

On June 10, 1971, petitioner appeared with counsel in the United States District Court for the Central District of California, Hon. William P. Gray, Judge Presiding, whereupon the Assistant United States Attorney presented a written application for an order compelling petitioner to produce the dental records under a grant of use-immunity pursuant to Title 18, United States Code, §§6002-6003. Petitioner, by his counsel, opposed the application on grounds, inter alia, that the statutes did not provide immunity co-extensive with the protection afforded by the Fifth Amendment and therefore the proposed order would violate that constitutional provision.

On the same day, the District Court made and entered a written order which noted that immunity under Title 18, United States Code, §§ 6002 and 6003 had been conferred on petitioner, and which ordered petitioner to "appear forthwith before the grand jury and testify and produce evidence with respect to all matters under inquiry by the grand jury . . . ."

A copy of said order as to petitioner is attached hereto as Appendix "B", and by reference is incorporated herein and made a part hereof.

On July 14, 1971, the subpoena duces tecum was limited to the previous three years and to males, aged 18-26 years.

Petitioner and counsel once more appeared before Hon. William P. Gray, Judge Presiding, on August 3, 1971, at which time petitioner was directed by the court to respond to the subpoena. Petitioner, through his counsel, respectfully refused to comply, upon the claim of the privilege against self-incrimination.

Petitioner was then asked the following question by the Court:

> "Q. Dr. Weg, do you refuse to comply with the order of the court?"

To which question petitioner answered as follows:

> "A. Yes, sir, I do respectfully so refuse."

Petitioner was then adjudged to be in civil contempt, execution of sentence to be suspended until August 9, 1971.

On August 10, 1971, the Court of Appeals for the Ninth Circuit granted petitioner's motion for a stay pending appeal in an order which also directed that the appeal be expedited under Title 18, United States Code, §1826(b), and provided a briefing and argument schedule which allowed petitioner eight (8) days to file his opening brief.

A copy of said Order of the Court of Appeals dated August 10, 1971, is attached hereto as Appendix "C".

The appeal was argued on September 1, 1971, and the next day the Court of Appeals rendered its judgment affirming the orders of the District Court adjudging petitioner in civil contempt and ordering him confined.

A copy of said judgment of the Court of Appeals is attached hereto as Appendix "A".

REASONS FOR GRANTING CERTIORARI

1. The Judgment of the Courts Below is in Direct Conflict With This Court's Opinion in Counselman v. Hitchcock, 142 U.S. 547 (1892)

In Counselman v. Hitchcock, 142 U.S. 547, at pages 585-586, this Court said:

> "No statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of

> the United States. . . . In view of the constitutional provision, a statutory enactment to be valid must afford absolute immunity against future prosecution for the offense to which it relates."

That pronouncement, expressed in the context of a federal use-immunity statute which this Court found violative of the Fifth Amendment, has been accepted by Congress and the courts as a viable constitutional principle for nearly eighty years.

Shortly after Counselman was decided, Congress amended the immunity statute in that case to provide transactional immunity. The latter statute was sustained in Brown v. Walker, 161 U.S. 591 (1896); and thereafter, every federal immunity statute sustained by the Court conferred absolute immunity. (See: Ullman v. United States, 350 U.S. 422 (1956); cf., Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).)

Even after the "use and fruits" formulation of Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964), which apparently provided the rationale for Sections 6002 and 6003[1/] this Court unanimously reaffirmed

---

1/ It is evident from the legislative history of this statute that Congress intended to authorize only "use" rather than "transactional" immunity. (U.S. Code Cong. & Adm. News, 91st Cong., 2d Sess., No. 12, Nov. 20, 1970, at p. 4706.)

(continued)

Counselman's requirement that a federal immunity must afford "absolute immunity against future prosecution for the offense to which the question relates." (Albertson v. S.C.A.B., supra, 382 U.S. at p. 80; see also: Gardner v. Broderick, 392 U.S. 273; 276 (1968).)

Moreover, the orders of the courts below conflict directly with those lines of decisions, beginning with Counselman, supra, 142 U.S. at p. 585, holding that statutory immunity is invalid unless co-extensive "in scope and effect" with the immunity afforded by the Fifth Amendment. (Murphy v. Waterfront Commission of New York, supra, 378 U.S. at p. 78.)

It is apparent that the use-immunity provided by §6002, 18 U.S.C., far from extending the same protection as the Fifth Amendment, equips the prosecution with a sweeping discovery device denied to the accused by the Jencks Statute (18 U.S.C. §3500), by the limitations of Rule 16 of the Federal Rules of Criminal Procedure, as construed and applied, and by the rarely unveiled secrecy which enshrouds grand jury proceedings and transcripts thereof. (See: United States v. Procter & Gamble Co.,

---

1/ Continued: Thus, the Committee's report on the effect and scope of this immunity statute explains that it --

> ". . . will afford 'use' immunity rather than 'transaction' immunity when a witness before a . . . grand jury . . . asserts his privilege against self-incrimination."

356 U.S. 677, 683 (1958); Pittsburgh Plate & Glass Co. v. United States, 360 U.S. 395, 400 (1959); cf., Dennis v. United States, 384 U.S. 855, 872 (1966).)

Additionally, §§6002 and 6003 enable the government to determine from the lips of a prospective defendant the weakness of his defenses - for example, whether in a criminal prosecution he is in a position to testify in his own defense; and if he is, by pinning the accused to testimony which, however innocently mistaken, he can change only at the risk of a subsequent perjury prosecution.

The immunity statute at bar permits the prosecution to learn from compelled testimony how to assemble diverse pieces of independent evidence already in its possession against an accused whose connection thereto had previously gone unnoticed or was not understood.

Finally, use-immunity statutes such as that at bar afford government investigators with virtually undetectable leads to independent witnesses and provide the mechanism for acquiring information which can be used to "refresh" an independent witness' recollection.

The Fifth Amendment protects such prospective defendants by affording the witness total protection against such use of his compelled testimony. So does statutory transaction immunity.

But "use-immunity" does not and cannot have the same scope and effect provided by the self-incrimination clause of the Fifth Amendment. Therefore the judgments of the courts below, resting as they do on a contrary view of that constitutional provision, appear to be in utter conflict with the decisions of this Court.

2. The Decisions of the Courts Below Raise Constitutional Questions of Far-Reaching Importance

In Piccirillo v. State of New York, No. 97, ___, U.S. ___, 27 L. Ed. 2d 596 (Jan. 25, 1971) (writ dismissed as improvidently granted) this Court deemed substantially the same question presented here to be of "far-reaching importance."

Since then, this Court has agreed to review three cases involving state "use-immunity" statutes which present essentially the same issues as those brought by Piccirillo, supra, and by petitioners, namely: Kastigar, Charles, and Stewart, Michael v. United States, Nos. 71-1212, 71-1213 (U.S.C.A. 9th Cir. 3/9/71); Sarno v. Illinois Crime Investigating Committee, No. 565, 39 LW 3375 (March 2, 1971) and Zicarelli v. New Jersey State Commission, No. 91, 39 LW 3375 (March 2, 1971).

In Zicarelli, supra, two of the questions on which probable jurisdiction was noted, ask:

> (1) Whether a state immunity statute which merely prevents the subsequent use of a witness' testimony and evidence derived therefrom is sufficient to supplant the Fifth Amendment's privilege against self-incrimination; and
>
> (2) Whether Counselman v. Hitchcock, 142 U.S. 547 (1892), which stated that absolute immunity against further prosecution is required before the Fifth Amendment may be supplanted, is still the law of the land.

The federal immunity statute involved here, 18 U.S.C. §§6002-6003, is a recent enactment, and represents the first attempt by Congress since Counselman to consciously revert to use-immunity. Congress appears to have done so by reading the "use and fruits" language of Murphy, supra, as overturning the absolute immunity requirement of Counselman and post-Murphy decisions.

On the other hand, the "use and fruits" rationale of Murphy was invoked "to accommodate the interests of the state and federal governments in investigating and prosecuting crime" (378 U.S. at p. 79). No problem of such accommodation is here involved. Even if it were, this case presents to this Court the constitutionality in any context of a federal use-immunity

statute for the first time since Counselman.

This seems to be the first federal case arising under §§6002 and 6003 to have reached this Court. It appears to be an appropriate vehicle for clarifying whether the constitutional standards of Counselman, or those applied by Murphy in a federal-state conflict situation should apply to a federal use-immunity where, as here, "only [the federal] government is involved", and hence, "the danger of prosecution [is] more imminent . . . ." (Concurring opinion of Mr. Justice White in Murphy v. Waterfront Commission, etc., supra, 378 U.S. at p. 98.)

3. The Decision of the Court of Appeals Below is in Conflict With a Decision in Another Circuit

In The Matter of the Grand Jury Testimony of Joanne Kinoy, No. M-11-188 (D.C.S.D.N.Y., decided 1/29/71), the Hon. Constance Baker Motley, D.J., in a memorandum opinion [not yet reported] which relied heavily on Counselman v. Hitchcock, supra, and distinguished Murphy, denied the government's application for an order compelling Miss Kinoy to answer questions before a federal grand jury under the grant of immunity conferred by §§6002 and 6003, upon the ground that the use immunity

offered by the statute at bar was not co-extensive with that afforded by the Fifth Amendment, and hence offended that provision.

The government did not appeal; and so far as petitioners can determine the Kinoy opinion is the only judicial decision other than that of the courts below, which has passed on the constitutionality of 18 U.S.C. §§6002 and 6003.

Since petitioners, in their reply brief and at oral argument, expressly called the Kinoy opinion to the attention of the Court of Appeals for the Ninth Circuit, it follows from the judgment at bar that the holding and reasoning of Kinoy were rejected by the Ninth Circuit.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

FRANK S. PESTANA

Attorney for Petitioner

APPENDIX "A"

APPENDIX "A"

Filed
Sep 2 1971
Wm. B. Luck, Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of the Subpoena to Testify Before the Grand Jury addressed to Martin S. Weg, DDS.	)
MARTIN S. WEG, DDS,	)
Appellant,	) No. 71-2216
v.	)
UNITED STATES OF AMERICA,	)
Appellee.	)

Appeal From the United States District Court for the Central District of California

Before: HAMLEY, KOELSCH, and HUFSTEDLER, Circuit Judges

PER CURIAM:

Martin S. Weg appeals from a district

court order, entered pursuant to 28 U.S.C. §1826, committing him to jail for civil contempt upon his refusal to produce medical records before a federal grand jury. Such refusal came after Weg had first declined to produce the records on the ground they might tend to incriminate him, following which the district court had granted him immunity under 18 U.S.C. §§6002 and 6003 and had ordered Weg to produce the records before the grand jury.

On this appeal, Weg argues: (1) Under the Fifth Amendment privilege against self-incrimination, testimony may not be compelled in the face of a claim of the privilege, however broad the immunity which is granted; and (2) the "use" immunity here granted under 18 U.S.C. §§ 6002 and 6003 does not provide protection commensurate with the self-incrimination clause of the Fifth Amendment, and testimony may not be compelled thereunder where the privilege is claimed.

The first of these arguments is foreclosed by decisions of the Supreme Court. See Reina v. United States, 364 U.S. 507, 514 (1960); Ullman v. United States, 350 U.S. 422, 429-31 (1956). See also Carter v. United States, 417 F.2d 384, 387 (9th Cir. 1969).

The second argument has been considered and rejected in several recent Ninth Circuit cases. See In re Bacon v. United States, ___ F.2d ___ (9th Cir. June 24, 1971); Charleston and Herlicy v. United States, ___ F.2d ___

(9th Cir. June 16, 1971); Stewart and Kastigar v. United States, 440 F. 2d 954 (9th Cir. 1971), cert. granted May 17, 1971.

While Weg invites us to reexamine the holdings of the Supreme Court and this court in the above-cited cases, we decline to do so. The problem is already before the Supreme Court in the Stewart and Kastigar case.

The order under review is affirmed. A petition for rehearing will not be entertained.

Counsel for appellant has advised the court that in the event of affirmance, appellant would apply for a writ of certiorari. Issuance of the mandate herein is therefore stayed thirty days to enable appellant to apply for a writ of certiorari. If a timely application for such a writ is filed, the stay shall remain in effect until the application has been denied or, if granted, until the cause has been determined by the Supreme Court.

APPENDIX "B" -

APPENDIX "B"

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In the Matter of	)	No. 2815
	)	
MARTIN S. WEG	)	ORDER

The United States of America, having made written and oral application for an order compelling Martin S. Weg to testify and produce evidence before a duly constituted grand jury of the Central District of California, pursuant to Title 18, United States Code, Sections 6002 and 6003, and

Martin S. Weg, having refused to testify or provide other information on the basis of the privilege against self-incrimination, the grand jury being engaged in an inquiry into alleged violations of laws of the United States; and

The application for immunity having been approved by the Attorney General of the United States and made by the United States Attorney in whose judgment the testimony sought is necessary to the public interest,

IT IS ORDERED that Martin S. Weg appear forth with before the grand jury and testify and produce evidence with respect to all matters under inquiry by the grand jury, in accordance with and subject to the provisions of 18 U.S.C. §§6002 and 6003.

DATED: This 10 day of June, 1971.

/s/ William P. Gray
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

APPENDIX "C"

Filed
Aug 10 1971
Wm. B. Luck, Clerk

IN THE UNITED STATES COURT
OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of the Subpoena to Testify before Grand Jury:	)	
MARTIN S. WEG, DDS.,	)	
Appellant,	)	No.
v.	)	71-2216
UNITED STATES OF AMERICA,	)	
Appellee.	)	

ORDER

Before: HAMLEY and HUFSTEDLER, Circuit Judges

To appellant's motion for a stay of execution of the order of confinement pending appeal is granted.

The appeal is ordered expedited. Appellant's opening brief shall be served and filed not later than August 19, 1971; appellee's brief shall be served and filed not later than August 26, 1971; appellant's reply brief, if any, shall be served and filed not later than August 30, 1971. The record shall be filed not later than August 26, 1971.

The cause is set down for oral argument September 1, 1971 at 1 p.m., United States Courthouse, Los Angeles, California.

Dated: August 10, 1971.

_____

_____

United States Circuit Judges

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